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Keyes v. Lynch

United States District Court, M.D. Pennsylvania. | November 9, 2015 | Not Reported in Fed. Supp. | 2015 WL 13594907 *(Approx. 13 pages)*

v.

Loretta E. LYNCH, Attorney General of the United States, et al., Defendants.

1:15-cv-457
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Attorneys and Law Firms

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Daniel M. Riess, U.S. Dept. of Justice, Washington, DC, for Defendants.

MEMORANDUM & ORDER

John E. Jones III, United States District Judge

***1** Presently pending before the Court is Defendants' motion to dismiss in part. (Doc. 10). For the reasons that follow, the Court shall grant Defendants' motion.

I. PROCEDURAL HISTORY

On March 5, 2015, Plaintiffs Michael L. Keyes, ("Keyes"), and Jonathan K. Yox, ("Yox"), filed a Complaint, alleging violations of their asserted Second Amendment right to keep and bear arms and Fifth Amendment equal protection and due process rights. (Doc. 1). Count I of the Complaint contends that, as applied to Plaintiffs, 18 U.S.C. § 922(g)(4) violates the Second Amendment. Count II alleges that, as applied to Yox, § 922(g)(4) violates the Second Amendment because Yox was under the age of 18 when he was involuntarily committed. Count III alleges that § 922(g)(4) violates the Due Process Clause of the Fifth Amendment as applied to Plaintiffs. Lastly, Count IV alleges that § 922(g)(4) violates Plaintiffs' equal protection rights secured under the Fifth Amendment. Plaintiffs seek various forms of declaratory and injunctive relief.

Defendants filed the instant motion to dismiss in part for failure to state a claim on May 11, 2015. (Doc. 10). They filed a brief in support of the motion on the same day. (Doc. 11). Plaintiffs filed a brief in opposition to the motion on May 22, 2015. (Doc. 12). Defendants filed a reply brief on June 9, 2015. (Doc. 13).

Defendants' motion is thus fully briefed and ripe for our review.

II. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6), courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). In resolving a motion to dismiss pursuant to Rule 12(b)(6), a court generally should consider only the allegations in the complaint, as well as "documents that are attached to or submitted with the complaint, ... and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level....' *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Accordingly, to satisfy the plausibility standard, the complaint must indicate that defendant's liability is more than "a sheer possibility." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly*, 550 U.S. at 557).

***2** Under the two-pronged approach articulated in *Twombly* and later formalized in *Iqbal*, a district court must first identify all factual allegations that constitute nothing more than "legal conclusions" or "naked assertions." *Twombly*, 550 U.S. at 555, 557. Such allegations are "not entitled to the assumption of truth" and must be disregarded for purposes of resolving a 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Next, the district court must identify "the 'nub' of the ... complaint—the well-pleaded, nonconclusory factual allegation[s]." *Id.* Taking these allegations as true, the district judge must then determine whether the complaint states a plausible claim for relief. *See id.*

However, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 556-57). Rule 8 "does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Id.* at 234.

III. FACTUAL SUMMARY

In accordance with the standard of review applicable to a motion to dismiss, the following facts are derived from the Plaintiffs' Complaint and are viewed in the light most favorable to the Plaintiffs.

Plaintiff Michael Keyes is a Master Trooper with the Pennsylvania State Police ("PSP"). (Doc. 1, ¶ 7). Plaintiff Jonathan Yox is a State Correctional Officer at the State Correctional Institution at Graterford. (*Id.*, ¶ 8).

Both Keyes and Yox were each once involuntarily committed for mental health concerns. Keyes was involuntarily committed as an adult at Holy Spirit Hospital in Cumberland County, Pennsylvania, on August 25, 2006, as a result of "imbibing in alcoholic beverages and making suicidal statements" as he was struggling through an "emotionally devastating" divorce. (*Id.*, ¶¶ 7, 21). He was initially involuntarily committed pursuant to 50 Pa. Stat. Ann. § 7302, allegedly in the absence of any due process, and then later, pursuant to 50 Pa. Stat. Ann. § 7303. (*Id.*). He was released by September 8, 2006. (*Id.*). Keyes never threatened to use a firearm against himself or others. (*Id.*, ¶ 22).

Yox was involuntarily committed as a juvenile at York Hospital, in Lebanon County, Pennsylvania, on March 30, 2006. (*Id.*, ¶ 50). He had been emotionally devastated by his parents' divorce and had begun cutting himself under the influence of an older girl. They also had made a suicide pact together. (*Id.*, ¶¶ 48-50). He was also initially involuntarily committed pursuant to 50 Pa. Stat. Ann. § 7302, allegedly in the absence of due process, and then later, pursuant to 50 Pa. Stat. Ann. § 7303. (*Id.*, ¶ 50). Yox was released by April 6, 2006. (*Id.*). In 2008, when he was 17, Yox enlisted in the U.S. Army. He honorably served until 2012, when he received an honorable discharge. (*Id.*, ¶¶ 52-53). During his time in the military, Yox spent six and a half months in a combat zone in Afghanistan. (*Id.*, ¶ 54). During his military service, Yox was trained to use, and did use, various kinds of firearms, including fully automatic rifles, machine guns, explosives, and grenade launchers. (*Id.*, ¶ 55). Upon his return from Afghanistan, Yox was not recommended for further psychological evaluation after his deployment briefing. (*Id.*, ¶ 56).

As a result of their involuntary commitments, Plaintiffs lost their "private capacity firearm rights" by operation of 18 Pa.C.S.A. § 6105(c)(4) and 18 U.S.C. § 922(g)(4). (*Id.*, ¶ 23). The Pennsylvania statute prohibits a "person who has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment ..." from possessing or using a firearm. 18 Pa.C.S.A. § 6105(c)(4). The federal statute, 18 U.S.C. § 922(g)(4), prohibits any person "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing firearms or ammunition.

***3** Notwithstanding their inability to possess guns in their private capacities, both Plaintiffs carry and use firearms in their current jobs. In his official capacity as a Master Trooper, Keyes carries a handgun on a daily basis, and when on patrol, he carries a fully automatic rifle and a shotgun. (*Id.*, ¶ 32). Yox actively possesses and uses a firearm in his official capacity as a State Correctional Officer. (*Id.*, ¶ 68). They are permitted to possess firearms in their official capacities as law enforcement officers by operation of 18 U.S.C. § 925(a)(1), which provides an exception to the firearms disability created by § 922(g)(4) for individuals benefitting in their official capacities the federal or state government. (*Id.*, ¶ 74).

On December 3, 2008, Keyes filed for Restoration of his State Firearm Rights with the Perry County Court of Common Pleas, pursuant to 18 Pa.C.S.A. § 6105(f).[1] (*Id.*, ¶ 24). The state court judge issued an order relieving Keyes only of his state firearm disability, finding that "Petitioner has in fact met his burden of showing that he may possess a firearm without risk to himself or any other person under the applicable provisions of law." (*Id.*, ¶¶ 25-26). On May 9, 2012, Keyes filed a request for expungement of his involuntary commitment; this request was denied by the state court. (*Id.*, ¶ 26). Keyes appealed this decision to the Superior Court. The Superior Court held that the language "the court may grant such relief as it deems appropriate" found in 18 Pa.C.S.A. § 6105(f)(1) does not provide the trial court with the power to expunge mental health commitment records and then affirmed the trial court's decision. *In re Keyes*, 83 A.3d 1016, 1024 (Pa. Super. Ct. 2013), *appeal denied*, 101 A.3d. 104 (Pa. 2014). (*Id.*, ¶ 27).[2]

On or about September or October of 2012, Yox was denied the ability to purchase a firearm after a Pennsylvania Instant Background Check System search. (*Id.*, ¶ 57). He appealed this denial to the PSP, which then informed him that he was prohibited pursuant to 18 Pa.C.S.A. § 6105 and 18 U.S.C. § 922(g) from owning a firearm based on his involuntary commitment in 2006. (*Id.*, ¶ 58). After having been evaluated by a psychologist who determined within a reasonable degree of psychological certainty that Yox did not pose a threat to himself or others, Yox filed a Petition to Vacate and Expunge his involuntary commitment with the Lancaster County Court of Common Pleas. (*Id.*, ¶¶ 59-60). However, the court found it was bound by *In re Keyes* and therefore prohibited from granting the relief of expungement. The court did grant Yox state relief from any disability imposed pursuant to 18 Pa.C.S.A. § 6105, based on a finding that Yox no longer suffers from the mental health condition that was the basis for his commitment and is able to safely possess a firearm with risk to himself or others. (*Id.*, ¶¶ 62-63).

Upon receipt and review of this state court order, the Bureau of Alcohol, Tobacco, and Firearms and Explosives', ("ATF"), Philadelphia Division Counsel Kevin White confirmed that it was ATF's position and policy that Yox remains prohibited under federal law from purchasing, possessing, or utilizing firearms in his private capacity, but that he could continue to possess and utilize firearms in his official capacity as a State Correctional Officer. (*Id.*, ¶ 64).

***4** Both Keyes and Yox presently intend to purchase and possess firearms in their private capacities for self-defense within their respective homes. (*Id.*, ¶¶ 44, 69). However, they are prevented from doing so only by Defendants' active enforcement of the laws and policies complained of in the matter *sub judice*. Keyes and Yox are unwilling to purchase, possess, or utilize a firearm in their private capacities because they fear arrest, prosecution, fine, and/or incarceration for violating 18 U.S.C. § 922(g)(4). (*Id.*, ¶¶ 46, 70).

IV. DISCUSSION

With the instant motion, Defendants move the Court to dismiss Counts I and III of the Complaint as to Plaintiff Michael Keyes, and to dismiss Count IV as to both Plaintiffs.

A. Whether Plaintiff Michael Keyes' Second Amendment and Equal Protection Claims are Barred Based on Doctrine of Issue Preclusion

Defendants argue that Counts I and IV should be dismissed as to Keyes on the basis of issue preclusion (also known as collateral estoppel) due to Keyes' prior litigation of the allegedly same Second Amendment and Fifth Amendment equal protection claims in state court, in the aforementioned *In re Keyes*, 83 A.3d 1016 (Pa. Super. Ct. 2013), *appeal denied*, 101 A.3d 104 (Pa. 2014).

Issue preclusion "prevents parties from relitigating an issue that has already been actually litigated." *Peloro v. United States*, 488 F.3d 163, 174 (3d Cir. 2007). In order for issue preclusion to apply, four elements must be satisfied: "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." *Id.* at 175 (internal quotations omitted). Traditionally, issue preclusion also required "mutuality," in other words, that the "parties on both sides of the current proceeding [must] be bound by the judgment in the prior proceeding." *Id.* at 175 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979)). However, under the modern doctrinal development of non-mutual issue preclusion, "a litigant may also be estopped from advancing a position that he or she has presented and lost in a prior proceeding against a different adversary." *Id.* (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324 (1971)).

Plaintiffs argue that issue preclusion is inappropriate in the instant action because Keyes never raised an "as-applied" challenge to 18 U.S.C. §§ 922(g)(4) and 925 in state court.[3] Plaintiffs contend that Keyes only raised facial challenges to §§ 922(g)(4) and 925 in his prior state court action. In other words, Plaintiff contends that the same issues are not being litigated in the present action and thus collateral estoppel does not apply. "A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (internal citation omitted). "An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *Id.* (citation omitted).

***5** As an initial matter, we agree with the Defendants that the relevant inquiry is not the nature of the claim being asserted, i.e. whether Keyes' state case involved claims of facial unconstitutionality or as-applied claims. The relevant inquiry is instead whether the same issue of fact or law was raised and determined in the prior proceeding. *See National R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519, 526 (3d Cir. 2002) (quoting Restatement (Second) of Judgments § 27 (1980)). Indeed, in *National R.R. Passenger Corp.*, the Third Circuit found the Eleventh Amendment immunity issue in two court proceedings to be identical even though the claims involved were predicated on different code sections. *Id.*[4]

It is notable that in the matter *sub judice*, Counts I and IV of the Complaint clearly allege that §§ 922(g)(4) and 925 violate the Second Amendment and the equal protection principles under the Fifth Amendment as applied to Keyes' particular factual circumstances. The questions for the Court then are whether the state court proceedings in *In re Keyes* involved those same issues, and whether there was a final determination as to those issues.

We now examine the state court proceedings at issue, which are matters of public record of which the Court may take judicial notice. *See M & M Stone Co.*, 388 Fed.Appx. at 162 (citing *Lum v. Bank of Am.*, 361 F.3d 217, 221 n.3 (3d Cir. 2004)). In *In re Keyes*, the Superior Court specifically considered Keyes' particular individual circumstances in evaluating his Second Amendment claim:

> In apparent anticipation of this conclusion, appellant argues that the exclusion of the mentally ill from the protection of the Second Amendment should not apply to him because he is no longer mentally ill. To this we respond that a present clean bill of mental health is no guarantee that a relapse is not possible. Given the extreme potential harm attendant to the possession of deadly weapons by the mentally ill, and the risk of relapse, we see an important government interest in controlling the availability of firearms for those who have ever been adjudicated mentally defective or have ever been committed to a mental institution but are now deemed to be cured....

> 83 A.3d at 1026-1027.

It is clear from this excerpt of the opinion that the Superior Court thoughtfully considered Keyes' Second Amendment argument as to his own factual circumstances—a prior one-time involuntary commitment due to mental health concerns and his alleged current status as mentally healthy. This excerpt additionally makes clear that the "actually litigated" prong of issue preclusion has been met in its specific reference to the fact that Keyes had made the above argument.

The Superior Court also manifestly considered the equal protection challenge at issue in the instant matter; that is, whether the statutory scheme of 18 U.S.C. §§ 922(g)(4) and 925 violate equal protection principles as applied to Keyes' specific factual circumstances. The Superior Court noted in its opinion that Keyes raised this specific argument in his briefing, wherein he asserted that the aforementioned statutes, "whereby he is permitted to possess firearms while on-duty as a Pennsylvania State Trooper, but not while off-duty, violates the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 1027.

***6** The Superior Court then specifically determined that § 922(g)(4) was constitutional as applied to Keyes:

> In appellant's case, section 925(a)(1) permits him to continue in his employment as a Pennsylvania State Trooper when he otherwise could not because of the disability to carry firearms under section 922(g)(4). Appellant may possess firearms while on the job but does so under the supervision of his superior officers and the observation of his fellow officers. There is no such supervision while appellant is off-duty. Were appellant to again fall into a depressive state with suicidal ideation, it would be much more likely to be discovered while he is on-duty and his superiors could then restrict his access to State Police firearms. Thus, we find a legitimate governmental purpose for section 925(a)(1), and that it has a rational basis.
>
> *Id.* at 1027-1028.

In sum, the Superior Court's opinion makes clear it considered Keyes' specific factual circumstances in relation to his Second Amendment and equal protection constitutional claims. While Keyes may have also raised what could be construed as facial claims in the state court proceedings below, he clearly raised what could be styled as as-applied challenges, as well, although as noted that is not a relevant distinction under the issue preclusion doctrine.

Plaintiffs also assert that the lack of mutuality prevents the application of issue preclusion in the instant matter. However, as we alluded to above, the preclusion doctrine has developed to now allow for non-mutual issue preclusion, in that "a litigant may also be estopped from advancing a position that he or she has presented and lost in a prior proceeding against a different adversary." *Peloro*, 488 F.3d at 175. Plaintiffs cite to *United States v. Mendoza*, 464 U.S. 154 (1984), for the proposition that mutuality is required in cases involving the federal government. In that case, the Supreme Court did indeed hold that nonmutual *offensive* collateral estoppel could not be invoked *against* the government. *Id.* at 163. However, *Mendoza* does not bar our application of issue preclusion in the matter *sub judice* because the federal government Defendants seek to use defensive collateral estoppel against Keyes, a private litigant. In order for defensive collateral estoppel to apply, "the party to be precluded must have had a 'full and fair' opportunity to litigate the issue in the first action." *Peloro*, 488 F.3d at 175 (internal citation omitted). We see no unfairness in the application of collateral estoppel against Keyes in this matter, given that he fully litigated these issues in the state court action. *See Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 333-34 (D.C. Cir. 2011) (allowing federal defendants to estop a plaintiff from asserting a constitutional claim against them where plaintiff had already litigated the claim in a prior action against a different defendant).

The other elements of issue preclusion are not in dispute, thus we have no trouble finding that they have been met. Accordingly, out of the principles of comity and judicial efficiency that underpin the doctrine of issue preclusion, we find that Plaintiff Keyes is barred from re-litigating his Second Amendment and Fifth Amendment equal protection claims, as alleged in Counts I and IV of the Complaint.

B. Due Process Claims Alleged in Count III

*7 In Count III of the Complaint, both Plaintiffs allege that the federal Defendants have violated their rights under the Due Process Clause of the Fifth Amendment by denying them the ability to purchase, possess, and utilize a firearm, as a result of an involuntary commitment, insofar as the involuntary commitment was pursuant to a state law, the aforementioned Pennsylvania's Mental Health Procedures Act, ("MHPA"), 50 Pa. Stat. Ann. §§ 7101-7503, that they allege lacks any standard for such a commitment. They also allege that their due process rights have been violated because they were not afforded notice and an opportunity to be heard on the firearm issue prior to the deprivation nor were they provided a post-deprivation hearing to seek relief from the deprivation. (Doc. 1, ¶ 99). These allegations assert procedural due process claims.

The Due Process Clause of the Fifth Amendment states that no one shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Analysis of a procedural due process claim involves two steps: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State ... the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (internal citations omitted). "It is axiomatic that a cognizable liberty or property interest must exist in the first instance for a procedural due process claim to lie." *Mudric v. Attorney Gen. of U.S.*, 469 F.3d 94, 98 (3d Cir. 2006); *see also Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998) ("[P]rocedural due process is implicated only where someone has claimed that there has been a taking or deprivation of a legally protected liberty or property interest.").

Defendants seek only to dismiss Count III as to Plaintiff Keyes. They argue that because Keyes' Second Amendment claim is precluded by collateral estoppel, he cannot assert a due process claim, the success of which is contingent on the success of the precluded Second Amendment claim. Plaintiffs do not meaningfully challenge this argument, other than to argue simply that Keyes' Second Amendment and equal protection claims are not precluded, thus the due process claim is not precluded, either.

We have already concluded that issue preclusion applies to Keyes' Second Amendment claim. As aforestated, Keyes cannot establish in this action that his asserted Second Amendment right to keep and bear arms is violated by 18 U.S.C. § 922(g)(4). Because Keyes cannot establish a legally protected liberty or property interest under the Second Amendment, we agree with Defendants' essentially unchallenged argument that Keyes cannot establish a due process violation in this action, either. *See Fisher v. Kealoha*, 49 F.Supp.3d 727, 748 (D. Haw. 2014) ("Because Plaintiff cannot establish a liberty or property interest under the Second Amendment, the Court further concludes that Plaintiff cannot establish that his Fourteenth Amendment due process rights were violated."); *see Hewitt v. Grabicki*, 794 F.2d 1372, 1380 (9th Cir. 1986) (ruling that a liberty or property interest must exist in order for a plaintiff to establish a due process violation). However, Defendants have not offered the Court any case law to buttress their position that issue preclusion can be used to cut off claims that have not themselves been previously litigated but that necessarily implicate issues that a party has already been estopped from litigating. For this reason, and given the gravity of the allegations insofar as Plaintiffs allege that their constitutional rights have been violated, we will also consider Defendants' alternative argument on the merits of Keyes' due process claims.

Defendants alternatively argue that Keyes' procedural due process claims fail as a matter of law based on *Bell v. United States*, No. 13-5533, 2013 WL 5763219, at *3 (E.D. Pa. Oct. 24, 2013), *aff'd*, 574 Fed.Appx. 59 (3d Cir. 2014). In *Bell*, the Third Circuit rejected a procedural due process challenge to 18 U.S.C. § 922(g)(1), the statute subsection which prohibits felons from possessing firearms, holding that "for the reasons stated by the District Court, that [the plaintiff]'s procedural due process claim ... [is] without merit." *Bell*, 574 Fed.Appx. at 61. There, the plaintiff claimed that § 922(g)(1) violated due process because it deprived him of the ability to possess a firearm without a hearing to determine his "future dangerousness." *Bell*, 2013 WL 5763219, at *3 (internal citation omitted). The district court found that "[t]he plain language of [that statute] makes clear Congress' decision to bar *all* convicted felons (not merely those with violent tendencies or who otherwise present an ongoing danger to society) from possessing firearms." *Id.* (quoting *Black v. Snow*, 272 F.Supp. 2d 21, 34 (D.D.C. 2003), *aff'd*, 110 Fed.Appx. 130 (D.C. Cir. 2004) (emphasis in *Black*)). Thus, the court held that the procedural due process claim failed because "due process does not entitle [a felon] to a hearing to determine whether he is currently

dangerous because the results of such a hearing would have no bearing on whether he is subject to the disability imposed by § 922(g)(1)." *Id.* (quoting *Black*, 272 F.Supp. 2d at 35).

***8** Plaintiffs do not address Defendants' argument that Keyes' due process claims fail under *Bell*, thus we find the argument effectively conceded. *See Hanoverian, Inc. v. Pa. Dep't of Envtl. Prot.*, No. 1:07-cv-00658, 2008 WL 906545, at *16 (M.D. Pa. Mar. 31, 2008) ("[W]hen a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded.") (quoting *Williams v. Savage*, 538 F.Supp. 2d 34, 41 (D.D.C. 2008)). However, in the interest of completeness, we will also address *Bell*'s relevance to the matter *sub judice*.

Although *Bell* does not bind the Court's decision in the instant matter because it concerned a different subsection of the statute, its reasoning is directly applicable, to the extent Keyes believes he is or was entitled to a hearing with regard to his alleged deprivation of his Second Amendment right to keep and bear arms, on the grounds that he is not or is no longer dangerous to himself or others due to mental illness. The plain language of 18 U.S.C. § 922(g)(4) makes clear that Congress intended to bar any person "who *has been* committed to a mental institution" from possessing a firearm. *Id.* at § 922(g)(4) (emphasis added). Based on the verb tense used in the statute and general common sense, Congress was aware that "a person committed to a mental institution later may be deemed cured and released," however the past commitment still "disqualifies." *United States v. Julian*, 974 F.Supp. 809, 814-15 (M.D. Pa. 1997) (quoting *Dickerson v. New Banner Inst.*, 460 U.S. 103, 116-17 (1983)). Although this may appear to be a harsh categorical prohibition, "Congress obviously felt that such a person, though unfortunate, was too much of a risk to be allowed firearms privileges." *Id.*

Keyes has already conceded that he has been committed to a mental institution pursuant to 50 Pa. Stat. Ann. §§ 7302 and 7303. (Doc. 1, ¶ 21). Due process does not entitle a person who has been previously committed to a mental institution and released to a hearing to determine whether he is currently mentally healthy, or was in fact mentally healthy and not dangerous at the time of the commitment, because the results of such a hearing would be irrelevant to the question of whether he is subject to the prohibition imposed by § 922(g)(4). *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) ("[Due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme").

Plaintiffs counter with a generalized argument that "traditional due process interests" apply to the prohibitions effected by §§ 922(g)(4) and 925(a)(1) based on § 925(c) and thus the claim does not fail.[5] Section 925(c) provides:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.
>
> ***9** 18 U.S.C. § 925(c).

Plaintiffs argue that § 925(c) evidences a Congressional intent to provide a mechanism for relief from firearms disabilities imposed pursuant to § 922(g). However, we fail to see the import of this conclusion with regard to the instant motion to dismiss. First, the language of § 925(c) does not support Keyes' due process assertion that he had a right to a hearing *prior* to the alleged deprivation effected by § 922(g)(4)—it only creates an avenue for individuals subject to § 922(g)(4) to seek relief from the firearm disability already in effect. And as to post-disability relief, as was discussed in *In re Keyes*, such relief is not currently possible under § 925(c) because Congress has not provided funding in appropriations for the application program. *In re Keyes*, 83 A.3d at 1029. However, we have no grounds to determine that the post-disability relief possibilities under § 925(c) rise to the level of due process rights applicable to a firearms disability pursuant to § 922(g)(4), nor have the

parties truly litigated this issue. In analyzing whether process is sufficient, one of the main considerations is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards ..." *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). And again, the only fact relevant to § 922(g)(4) is whether a person has been "adjudicated as a mental defective" or "committed to a mental institution."[6] Thus, the application review process created by § 925(c) would be irrelevant to the sole material issue of § 922(g)(4).

To be sure, Plaintiffs are in a conundrum: according to the statutory text of § 925(c), there is a process available to them to seek individualized review of whether it is necessary for them to remain subject to the firearms disability created by § 922(g)(4). Congress is in effect speaking out of both sides of its institutional mouth, as it were, by countenancing such a review process but then paralyzing the same process by failing to fund it. However, how Plaintiffs' rights are affected by the failure to fund the ATF application program referenced in § 925(c) is effectively a red herring when it comes to adjudicating the constitutional issue of required due process under § 922(g)(4).

***10** We further note that any due process concerns we may have harbored regarding Keyes' federal firearms disability based on his involuntary commitment is alleviated by the fact that Keyes' later involuntary commitment was pursuant to 50 Pa. Stat. Ann. § 7303, which does provide for appointment of counsel, a hearing before a judge[7], a right to ask questions of witnesses, and a requirement that the judge issue findings as to the reasons that extended involuntary treatment is necessary. *Id.* at §§ 7303(b) and 7303(c).[8] Notably, Keyes does not allege that the procedures outlined in § 7303 were not followed in his case.

Plaintiffs additionally allege a due process claim based on the theory that Pennsylvania's MHPA is not consistent with the Supreme Court's decision in *Addington vs. Texas*, 441 U.S. 418 (1979), and therefore a federal firearms restriction based on that commitment violates principles of due process. More specifically, Plaintiffs allege that the MHPA lacks any standard for such a commitment, which they then assert violates *Addington.* First, *Addington* is not directly applicable to the instant matter because there, the question for review by the Supreme Court was "what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily *for an indefinite period* to a state mental hospital." *Id.* at 419-20 (emphasis added). As aforementioned, Keyes was committed under §§ 7302 and 7303 of the MHPA. Sections 7302 and 7303 do not apply to commitments for an indefinite time period. They instead establish procedures governing emergency involuntary commitments, the duration of which cannot exceed 120 hours (for commitments under § 7302) or 20 days (for commitments under § 7303). *See* 50 Pa. Stat. Ann. §§ 7302(d) and 7303(h).

Both parties fail to mention, much less brief, the fact that in light of *Addington* and other cases concerning due process in civil cases, Pennsylvania courts have decided to construe commitments pursuant to § 7303 to require proof by clear and convincing evidence that a person represents a clear and present danger to himself or others. *In re Hancock*, 719 A.2d 1053 (Pa. Super. Ct. 1998). However, we see no specific allegation by Keyes that this standard of proof was not applied in his case. If this standard of proof was in fact not applied in Keyes' case, Keyes should amend his pleadings to state this fact, and the parties may then brief how or whether this defective proceeding impacts the constitutionality of his firearms disability pursuant to § 922(g)(4).

In sum, we find that Keyes has failed to adequately state a due process claim under the Fifth Amendment and thus Count III is dismissed with regard to his due process claims.

C. Count IV

***11** In Count IV of the Complaint, Plaintiffs allege that Defendants have violated their Fifth Amendment right to equal protection under the law by denying them the ability to purchase, possess, or utilize a firearm in their private capacities, as a result of their involuntary commitments, while permitting them to possess and use firearms in their official capacities in which they are benefitting the federal or state government. (Doc. 1, ¶ 108). They ask the Court to declare that § 922(g)(4) violates Plaintiffs' right to equal protection under the Fifth Amendment.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST.

amend. XIV, § 1. This protection applies to the federal government, as well, through the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). To state an equal protection claim a plaintiff must allege facts showing that he or she is a "member[ ] of a protected class and that [he or she] received different treatment than that received by other similarly-situated individuals." *Oliveira v. Twp. of Irvington*, 41 Fed.Appx. 555, 559 (3d Cir. 2002). Plaintiffs do not disagree that this is the applicable law. Persons are considered to be "similarly situated" under the equal protection clause "when they are alike 'in all relevant aspects.' " *Suber v. Guinta*, 902 F.Supp.2d 591, 606-7 (E.D. Pa. 2012) (citing *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008)).

Defendants argue that Plaintiffs' equal protection claims should fail because they have not in fact alleged that they have been treated differently from any similarly situated persons, but rather that they in their own two "capacities" have been treated differently due to the operation of 18 U.S.C. §§ 924(g)(4) and 925(a)(1). Defendants state they are aware of no case holding in which such a contention would state a valid equal protection claim. In their brief in opposition, Plaintiffs fail to cite to any case law at all to support their position that the "similarly situated persons" prong can be met under such a theory.

Plaintiffs' equal protection claim is somewhat clever but fundamentally outside of the parameters of a cognizable claim under equal protection doctrine. Plaintiffs cannot themselves be both the persons receiving alleged differential treatment than that received by "other ... individuals" and also qualify as those "other ... individuals." *See Oliveira*, 41 Fed.Appx. at 559. This is an obvious logical fallacy. Furthermore, if anything, the § 925(a)(1) exception is better understood as a carve-out benefitting persons such as Plaintiffs in allowing them to be able to hold jobs in law enforcement, rather than as a tool of discrimination against Plaintiffs in their private capacities.

Accordingly, because Plaintiffs have not alleged the required elements of a prima facie equal protection claim, the Court shall dismiss Count IV of the Complaint.

V. CONCLUSION

For all the reasons stated hereinabove, we shall grant Defendants' motion to dismiss in part. Counts I and IV are dismissed with prejudice with respect to Plaintiff Keyes. We shall also dismiss Count III with respect to Keyes, but without prejudice. Count IV is dismissed without prejudice only as to Yox. We find it very unlikely that Keyes will be able to resurrect his due process claims alleged in Count III or that Yox will be able to state a cognizable equal protection claim. However, we are mindful of our Circuit's mandate in *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251-52 (3d Cir. 2007), that district courts must offer leave to amend in civil rights cases, "irrespective of whether it is requested," when dismissing a case at the Rule 12(b)(6) stage, "unless doing so would be inequitable or futile." *Id.* Thus, we will offer leave to amend but only with respect to Keyes' due process claims and Yox's equal protection claim.

***12** **NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion to Dismiss in Part, (Doc. 10), is **GRANTED**.

   A. Counts I and IV are **DISMISSED** with prejudice with respect to Plaintiff Keyes.

   B. Plaintiff Keyes' claims alleged in Count III are **DISMISSED** without prejudice. He is **GRANTED** leave to amend his pleading within twenty (20) days of the date or this Order to the extent there are facts which, if true, support his due process claims. If Plaintiff Keyes does not file an amended pleading in that time, the dismissal of his claims alleged in Count III will be deemed prejudicial.

   C. Plaintiff Yox's equal protection claim alleged in Count IV is **DISMISSED** without prejudice. He is **GRANTED** leave to amend his pleading within twenty (20) days of the date of this Order to the extent there are facts which, if true, support his equal protection claim. If Plaintiff Yox does not file an amended pleading in that time, the above dismissal of his Count IV claim will be deemed prejudicial.

All Citations

Not Reported in Fed. Supp., 2015 WL 13594907

Footnotes

1 Section 6105(f)(1) reads: "Upon application to the court of common pleas under this subsection by an applicant subject to the prohibitions under subsection (c)(4), the court may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person."

2 We note that Plaintiffs likely inadvertently mischaracterized the Superior Court's holding in their Complaint where they allege that the court held that § 6105(f) "does" provide the trial court with the power to expunge mental health commitment records.

3 Plaintiffs additionally argue that issue preclusion is an affirmative defense that is inappropriate to raise in a pre-answer motion to dismiss. However, as Defendants correctly assert, issue preclusion may indeed be raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *M & M Stone Co. v. Pennsylvania*, 388 Fed.Appx. 156, 162 (3d Cir. 2010) (citing *Connelly Found. v. Sch. Dist. of Haverford Twp.*, 461 F.2d 495, 496 (3d Cir. 1972)).

4 Plaintiffs place great weight on *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), for the proposition that issue preclusion does not apply in the instant matter. We agree with Defendants that such reliance is misplaced. *Citizens United* contained no discussion of issue preclusion doctrine. Its discussion of the issue of whether a party who had stipulated to a dismissal of a facial challenge to a law but who had not dismissed its as-applied constitutional challenge had thereby waived its right to argue that a prior Supreme Court case should be overturned has no real bearing on the "same issue" prong of issue preclusion, or on the question of whether an issue has been previously adjudicated.

5 Defendants note that they never made this argument in their motion to dismiss—that due process interests do not apply to these statutes.

6 Judicial review is not currently possible of Keyes' petition for relief from firearms disabilities, either. *United States v. Bean*, 537 U.S. 71 (2002). In *Bean*, a person with a felony conviction filed suit with a federal district court, asking the court to "conduct its own inquiry into his fitness to possess a gun and to issue a judicial order granting relief." *Id.* at 71. The Court reviewed the statutory scheme outlined in § 925(c) and held that judicial review of a person's petition for relief from firearms disabilities cannot occur without a "dispositive decision by ATF." *Id.*

Here, Keyes has confirmed with ATF Division Counsel Kevin White that "there is no mechanism available in Pennsylvania or under federal law for Mr. Keyes to obtain relief from his federal disability, as a result of his commitment." (Doc. 1, ¶ 40). We see no allegation that Keyes has received a "dispositive decision" from the ATF. Thus, this Court is barred from conducting a hearing to review Keyes' firearm disability, even if § 925(c) indicates that such judicial review is a possibility.

7 This hearing can also be conducted by a mental health review officer; however, in that case, the person subject to treatment has the "right to petition the court of common pleas for review of the certification." *Id.* at § 7303(g).

8 Although this specific issue was not briefed by the parties, we note that some courts have recently construed certain state commitments as not falling within the statutory phrase "committed to a mental institution" under § 922(g)(4). *See, e.g., United States v. Rehlander*, 666 F.3d 45, 46, 51 (1st Cir. 2012) (reversing judgments of conviction of two defendants convicted under § 922(g)(4)). However, *Rehlander* is distinguishable from the instant matter because the two defendants had been involuntarily admitted to psychiatric hospitals under Maine's "emergency procedure," which only involved an ex

parte proceeding where the judge was not required to make substantive findings.

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